STATE OF MICHIGAN

IN THE SUPREME COURT

DAVID M. MICK,

Plaintiff-Appellee,

-vs-

LAKE ORION COMMUNITY SCHOOLS, ROBERT BASS, RICHARD KAST, CRAIG A. YOUNKMAN, GLORIA ROSSI, CHRISTINE LEHMAN, DAVID BEITER,

Defendants-Appellants,

-and-

DAVID M. MICK,

Plaintiff-Appellee

-vs-

ROBERT BASS, an individual and RICHARD KAST, an individual,

Defendants-Appellants,

_____/

Supreme Court No. 126547

Court of Appeals No. 241121

Oakland County Circuit Court No. 00-027577-NZ

Supreme Court No. 126548

Court of Appeals No. 241122

Oakland County Circuit Court No. 01-033085-NZ

126547-8

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SUPPLEMENTAL BRIEF IN SUPPORT OF PEREMPTORY REVERSAL OR LEAVE TO APPEAL

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STATEMENT IDENTIFYING COMPLAINED-OF OPINION AND SETTING FORTH REQUESTED RELIEF

Pursuant to MCR 7.302(A)(1)(a), defendants-appellants Lake Orion Community Schools, Robert Bass, Richard Kast, Craig A. Younkman, Gloria Rossi, Christine Lehman, and David Beiter, all of whom shall hereinafter collectively be referred to as defendants, state that this application for leave to appeal seeks the Court's review of the Court of Appeals June 3, 2004 opinion reversing in part the Oakland County Circuit Court's March 25, 2000 order granting defendants' motion for summary disposition. Defendants seek a peremptory reversal of the Court of Appeals ruling reversing the trial court's grant of summary disposition to defendants and, failing that, a grant of their application for leave to appeal.

QUESTIONS PRESENTED FOR REVIEW

I.

BECAUSE PLAINTIFF FAILED TO ESTABLISH A PRIMA FACIE CASE OF REVERSE DISCRIMINATION EITHER THROUGH THE USE OF DIRECT EVIDENCE OR THROUGH RESORT TO THE *McDONNELL-DOUGLAS* METHODOLOGY, DOES THE COURT PROPERLY PEREMPTORILY REVERSE THE COURT OF APPEALS DECISION OR GRANT THE LAKE ORION COMMUNITY SCHOOLS LEAVE TO APPEAL?

Defendant-Appellant Lake Orion Community Schools answers "Yes."[1]

Plaintiff-Appellee David M. Mick answers "No."

II.

IN THE FACE OF PLAINTIFF'S FAILURE TO DEMONSTRATE THE EXISTENCE OF A GENUINE ISSUE OF FACT CONCERNING TWO OF THE ELEMENTS OF A PRIMA FACIE CASE OF RETALIATION, I.E., AN ADVERSE EMPLOYMENT ACTION AND CAUSATION, DOES THE COURT PROPERLY PEREMPTORILY REVERSE THE COURT OF APPEALS DECISION OR GRANT DEFENDANTS LEAVE TO APPEAL?

Defendants-Appellants Lake Orion Community Schools, Robert Bass, Richard Kast, Craig A. Younkman , Gloria Rossi, Christine Lehman, and David Beiter answer "Yes."

Plaintiff-Appellee David M. Mick answers "No."

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[1]The Court of Appeals dismissed the discrimination claim against the individuals on the basis of *Jager v Nationwide Truck*, 252 Mich App 464; 652 NW2d 503 (2002) because the statute allows recovery only against an employer. Thus, the discrimination claim remains pending only against Lake Orion Community Schools.

COUNTERSTATEMENT OF FACTS

A. NATURE OF THE ACTION.

David M. Mick (Mick) filed suit against Lake Orion Community Schools, Robert Bass, Richard Kast, Craig A. Younkman, Gloria Rossi, Christine Lehman, and David Beiter on November 21, 2000. (Plaintiff's Complaint, Oakland County Circuit Court No. 00-027577-NZ). The summons expired on February 20, 2001. Because he failed to serve Bass and Kast on or before February 20, 2001, Mick brought a separate action against them on July 6, 2001. (Plaintiff's Complaint, Oakland County Circuit Court No. 01-033085-NZ). The two cases were then consolidated. (Order, 8/20/01).

In both complaints, Mick asserted two counts: a claim of reverse gender discrimination under the Elliott-Larsen Civil Rights Act (Count I) and a claim of retaliation (Count II). The trial court granted defendants' motion for summary disposition (Order, 3/25/02) and denied Mick's motion for reconsideration. (Opinion and Order, 4/11/02). In an opinion dated June 3, 2004, the Court of Appeals affirmed the trial court's decision in part and reversed in part. Remaining in the case is a reverse discrimination claim against the Lake Orion Community Schools only and a retaliation claim against all the defendants.

B. MICK'S EMPLOYMENT WITH THE LAKE ORION SCHOOL DISTRICT AND HIS EFFORTS TO OBTAIN AN ADMINISTRATIVE POSITION.

1. ELEMENTARY AND MIDDLE SCHOOL ADMINISTRATIVE POSITIONS.

With the exception of a single two-year hiatus, Mick has been a teacher with the Lake Orion Community Schools since 1974. Mick's allegations revolved around claims that Mick was denied administrative positions as principal or assistant principal during the 1991 to 1999 tenure of former Superintendent Robert Bass on the basis of reverse sex discrimination and/or retaliation. The Lake Orion Community Schools filled many elementary and middle school

administrative positions from 1991 to the present. (Exhibit A, Defendants' Motion for Summary Disposition).[2] During that time period, the Lake Orion Community Schools employed males as principals at both the elementary and middle school levels. In fact, the school district hired nine men to serve as elementary or middle school principals or assistants during the pertinent time:

Year	Name	Position
1991	David Beiter	Sims Elementary Principal
1991	David Beiter	Waldon Middle School Principal
1995	Derek Fries	Middle School Assistant Principal
1995	David Beiter	Scripps Middle School Principal
1996	Don Hammond	Middle School Assistant Principal
1998	Burt Quinn	Orion Oaks Administrative Assistant
1999	Jesse Baker	Stadium Drive Elementary Principal
1999	Kenneth Gutman	Scripps Middle School Principal
2000	Eric Whitney	Orion Oaks Administrative Assistant
2001	Eric Whitney	Sims Elementary Principal
2001	Brian Kaplan	Orion Oaks Administrative Assistant
2001	Dan Haas	Middle School Assistant Principal

This list does not include administrators hired at the secondary or high school level, many of whom were also male.

Mick was interviewed for numerous positions, both inside and outside the school district. He was never the successful candidate. During this same 1990 to 2001 time frame, the district hired eleven female principals or assistants.

2. MICK'S CLAIMS OF DISCRIMINATION GENERALLY.

On or about July 1, 1998, Mick filed a charge of discrimination with the EEOC. (Mick Dep, Exhibit 13, Defendants' Motion for Summary Disposition). There, Mick complained that he had been "passed over for five Elementary Principalships, most recently on July 1, 1998."

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[2]Many of Lake Orion Community Schools' administrative records were destroyed by fire in February 1997. This list was compiled by Christine Lehman, Assistant Superintendent for Human Resources, with assistance from others in the school district. (See Affidavit of Christine Lehman, Exhibit B, Defendants' Motion for Summary Disposition).

(*Id.*) In July of 1999, soon after Dr. Younkman started as superintendent of the Lake Orion Community Schools, Mick met with him and provided a "Chronology" outlining Mick's allegations of discrimination. (Mick Dep, Exhibit 4, Defendants' Motion for Summary Disposition). In this document, Mick complained that he was wrongfully denied seven principal and two assistant principal positions. (Exhibit A, Defendants' Motion for Summary Disposition).[3]

No one ever told Mick that he was not hired for a position because he is male:

> Q In all of those meetings that you had with Kast and Bass and Mabery and any other representatives of Lake Orion Community Schools, did anyone ever tell you or suggest to you that you were not hired because you were a male?
>
> A No. No one told me that.

(Mick Dep, p 48, Defendants' Motion for Summary Disposition). In fact, Mick admitted that, prior to his charge of discrimination in July of 1998, he had not made any complaints of discrimination to any administrator. (Mick Dep, pp 86, 99, Defendant's Motion for Summary Disposition). But, Mick recalled a meeting with one member of the board of education in the fall of 1996, during which Mick was asked the reason he was not hired. (Mick Dep, pp 81-82, Defendants' Motion for Summary Disposition). Mick said that he "didn't really know" why he had not been hired. (Mick Dep, p 81). When asked if he could see a pattern, Mick said "[W]ell, it seems that females were being hired for these positions, this was quite apparent." (*Id.*)

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[3]Although Mick claimed he was discriminated against on the basis of sex in not being awarded the principal position at Blanche Sims Elementary in 1991, another male candidate won the position. Mick had forgotten that David Beiter was awarded the principal position at Blanche Sims in 1991, prior to being transferred to take over as principal at Waldon Middle School. (Mick Dep, pp 32-35, Defendants' Motion for Summary Disposition).

3. DENIAL OF ADMINISTRATIVE POSITIONS COMPLAINED OF BY MICK BUT OUTSIDE OF THE STATUTE OF LIMITATIONS NO LONGER A BASIS OF ANY CLAIM.

Mick complained about not being hired for administrative positions including the 1991 Blanche Sims elementary school principle, the Waldon Middle School assistant principal, the 1995 Pine Tree elementary principal, the 1996 Blanche Sims elementary principal, the 1996 Webber elementary principal, the assistant principal position at Waldon Middle School, and the 1997 Orion Oaks elementary assistant principal.[4]

4. DENIAL OF POSITIONS COMPLAINED OF BY MICK WITHIN THREE YEARS OF FILING THE COMPLAINT.

a. 1998 Orion Oaks Elementary Principal.

In the summer of 1998, Superintendent Bass appointed Lehman to serve as an administrative intern in the central office. Lehman had expressed an interest in pursuing a central office administrative position in Lake Orion or in another district and she was given an opportunity to train for career advancement in the central office. (Lehman Affidavit, Exhibit B). Lehman's appointment to an administrative intern position left vacant the principal position at Orion Oaks. Bass appointed O'Neil to fill the position. O'Neil had served the school as assistant principal during the 1997-98 school year. As of the time she started as principal, O'Neil had earned a master's degree from Michigan State University. (Lehman Affidavit, Exhibit B; Bass Dep, Exhibit C, pp 48-52).

b. Mick's Formal Charge Of Discrimination.

On July 1, 1998, the same day as Melanie Olds O'Neil's appointment to the principal position at Orion Oaks Elementary, Mick filed a charge of discrimination with the EEOC. (Mick

[4]The trial court held that these claims were time-barred and the Court of Appeals upheld that ruling. Thus, Mick's attack on the selection process and decisions made to fill these positions is no longer an issue in the case.

Dep, Exhibit 13). There, he complained that he has been "passed over for five Elementary Principalships, most recently on July 1, 1998." Prior to his July 1, 1998 EEOC charge, Mick had never raised a claim of discrimination with any administrator at the Lake Orion Community Schools. Although Mick had expressed disappointment and had requested feedback, he had never asserted that he was denied positions due to reverse sex discrimination. In addition, while he had apparently discussed his concerns with one individual board of education member, Mick never made any complaint to the school district prior to his EEOC filing. (Mick Dep, pp 81-82, 86, 99).

c. 1999 Stadium Drive Elementary Principal.

In 1999, Jim Theunick, the long time principal of Stadium Drive Elementary, retired. Lehman oversaw the committee process for the selection of a new principal. Because he did not have administrative experience, Mick was not interviewed. The committee chose Jesse Baker, a male, as the new principal for Stadium Drive Elementary. (Lehman Affidavit, ¶14, Exhibit B).

d. 2000 Pine Tree Elementary Principal.

In 2000, Bev Tepper transferred to the principal position at the new Paint Creek Elementary School. This created a vacancy in the principal position at Pine Tree. Lehman oversaw a committee process at Pine Tree. Again, the committee consisted of Lehman, a principal, teachers, parents, community members, and a student. The committee interviewed Mick. Following the interviews, the committee selected Diane Dunaskiss as the new principal. Dunaskiss has her master's degree in special education from Oakland University. Among her other accomplishments, Dunaskiss had also been elected to the Wayne State University Board of Governors. (Lehman Affidavit, ¶15, Exhibit B).

5. MICK'S RESIGNATION AS SCHOOL IMPROVEMENT CHAIR FOR WEBBER ELEMENTARY AND REMOVAL AS CURRICULUM COMMITTEE CHAIR.

Mick asserted that he was retaliated against by being removed from the membership of two committees, the school improvement committee at Webber Elementary in early 1999 and the curriculum committee in October of 2000. (Mick Dep, Exhibits 19-27). Assistant Superintendent for Curriculum and Instruction Beiter removed Mick from this latter position. His reasons for doing so were discussed in an October 20, 2000 memo to Mick (Mick Dep, Exhibit B, Exhibit 33) and in Beiter's deposition testimony. (Beiter Dep, Exhibit I, pp 82-91). Beiter replaced Mick because roughly ten different people had expressed their lack of confidence in Mick's leadership. (Beiter Dep, Exhibit I, p 84). In addition, Beiter felt that Mick was not doing an adequate job on aligning standards for the department and other events. (*Id.*, pp 81-89).

6. DEMOGRAPHICS OF ELEMENTARY AND MIDDLE SCHOOL PRINCIPALS.

As of October, 2002, when defendants filed their brief on appeal with the Court of Appeals, there were 1,414 elementary school principal members of the Michigan Elementary and Middle School Principals Association ("MEMSPA"). 807 were female and 607 were male. Shortly after World War II, elementary principals were eighty percent male and only twenty percent female. Since that time, there has been a steady increase in the percentage of female elementary principals. At the middle school level, there were 149 MEMSPA members. Ninety-seven were male and fifty-two were female. The executive director of MEMSPA, Joanne Welihan, opined that because elementary teaching staffs are predominately female and there are more qualified female candidates as a result, more women are becoming principals at the elementary level statewide. (Affidavit of Joanne Welihan, Exhibit J).

C. THE CHARACTER OF PLEADINGS AND PROCEEDINGS.

1. THE TRIAL COURT PROCEEDINGS.

Mick commenced this action on November 21, 2000. Due to the expiration of the summons as to defendants Bass and Kast, Mick brought a second suit against them, and the matters were consolidated. Both complaints contained two counts. Those were for gender discrimination under the Elliott-Larsen Civil Rights Act (Count I) and retaliation for filing a charge of discrimination (Count II).

Mick complained that he repeatedly applied for elementary school principal positions but that he was not hired. (Complaint, Oakland County Circuit Court No. 01-033085-NZ, ¶¶ 5-11; Complaint, Oakland County Circuit Court No. 00-027577-NZ, ¶¶ 10-16). Mick asserted that he was fully qualified for the positions he sought but that he was not hired because defendants discriminated against him on the basis of his gender. (Complaint, Count I, ¶¶ 28-33; Complaint, Count I, ¶¶ 39-44). Mick also charged that, after he filed a complaint with the EEOC, defendants retaliated against him by denying him employment opportunities which he should have achieved. (Complaint, Count II, ¶¶ 34-37; Complaint, Count II, ¶¶ 45-48).

Defendants filed an answer to both complaints, the thrust of which was to deny any liability to Mick. (Answer of Defendants Robert Bass and Richard Kast to Plaintiff's Complaint, Oakland County Circuit Court No. 01-033085-NZ, 7/26/01; Answer to Defendants Lake Orion Community Schools, Craig A. Younkman, Gloria Rossi, Christine Lehman, & David Beiter, Only, 12/21/00). Defendants also raised various affirmative defenses, including the failure to state a claim upon which relief could be granted and the expiration of the applicable statutes of limitations. (*Id.*) After discovery, defendants sought summary disposition. (Defendants' Motion for Summary Disposition, 12/13/01). They maintained that Mick's claims relating to the denial of positions prior to November 25, 1997, (or July 6, 1998, for Bass and Kast) were time-

barred by the applicable three-year statute of limitations. (Defendants' Motion for Summary Disposition, 2).[5] Defendants also contended that Mick's reverse gender discrimination and retaliation claims were properly subject to dismissal pursuant to MCR 2.116(C)(10). (*Id.*) Defendants supported their motion with a series of exhibits (Exhibits A through L) and with the deposition of Mick including Exhibits 1 through 33. Defendants furnished additional exhibits (Exhibits K through T) in connection with their reply brief.[6] After several rounds of briefing, the trial court heard oral arguments on February 13, 2002. (Tr, 2/13/02, pp 2-18).

The trial court observed that, although Mick raised the continuing violation doctrine in his sur-reply, he failed to address the statute of limitations issue in his response. (Tr, 2/13/02, p 10). The trial court also concluded in each case that Mick's claims were properly confined to conduct within the three-year period preceding the filing of each complaint. (Tr, 2/13/02, p 11). The trial court predicated its ruling on a review of the documentation submitted by the parties, on the fact that Mick failed to give the defendants notice until he filed an EEOC claim in 1998, and on the effect of the applicable statute of limitations, MCL 600.5805(8). (Tr, 2/13/02, pp 10-11).

With respect to Mick's gender discrimination claim, the trial court set forth the elements of such discrimination. (Tr, 2/13/02, pp 11-12). It then concluded that Mick could not establish a prima facie case. Responding to Mick's argument that he satisfied a listing of the qualifications for an elementary school principal, the trial court observed that those were mere rudimentary qualifications and that in each instance a committee considered various

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[5]The applicable statutes of limitation extended back for differing time periods. All defendants, with the exception of Bass and Kast, were sued in the original action. Thus, the claims as to them extended back to November 21, 1997. Bass and Kast were brought into the litigation by virtue of a second complaint, and the claims against them were barred if they occurred prior to July 6, 1998.

[6]For the Court's ease of reference, Exhibits A through T to that motion were included in defendants' appendix to its application for leave to appeal using the same lettering. Defendants have supplied the exhibits to Mick's deposition as Exhibit Q to the application.

qualifications and declined to promote Mick at the same time that the qualifications of the successful candidates were excellent. (Tr, 2/13/02, p 13). The trial court also noted that Mick had applied for administrative positions in thirty other school districts but had only obtained interviews in seven districts and was not selected for any of the positions. (Tr, 2/13/02, p 14). After considering the evidence, the trial court held that Mick could not proceed with his reverse discrimination claim:

> [I]n reviewing it all and taking it in the light according to the law I read when we began this opinion in connection with the matter, I just do not see in any fashion where the plaintiff has proven in any way, according to the standard established by the various cases, that he wasn't promoted because he was a male.

(Tr, 2/13/02, pp 14-15). The trial court further noted that it "just isn't there, based on the affidavits and based on the material submitted." (Tr, 2/13/02, p 15).

The trial court then considered Mick's retaliation claim and reviewed the elements of a prima facie case of retaliation. (Tr, 2/13/02, pp 15-16). The trial court was not satisfied that a fact question existed. (Tr, 2/13/02, pp 17-18). As a result, it granted the motion to dismiss Mike's retaliation count as well. (*Id.*)

Mick timely sought rehearing. The trial court denied the motion. In the trial court's view, Mick presented the same issues in his motion for rehearing as the trial court had originally ruled upon. (Opinion and Order, 4/11/02.)

2. THE COURT OF APPEALS DECISION.

In a split decision dated June 3, 2004, the Court of Appeals majority affirmed in part and reversed in part the trial court's summary disposition rulings. In particular, the Court of Appeals majority reversed the dismissal of certain gender discrimination claims against the Lake Orion Community Schools and reversed in part the dismissal of Mick's retaliation claims. Concerning the former, the Court of Appeals noted the decision in *Jager v Nationwide Truck*, 252 Mich App 464; 652 NW2d 503 (2002) to the effect that the Civil Rights Act's anti-discrimination provision

foreclosures individual liability and allows only for employer liability. Accordingly, the majority felt bound to affirm the dismissal of Mick's gender discrimination claims as against the individual defendants. The Court of Appeals also found that the period of limitations for the remaining gender discrimination claims was three years under MCL 600.5805(8), such that Mick was allowed to pursue his claims against Lake Orion Community Schools for events which occurred after November 21, 1997.[7]

The Court of Appeals majority reversed the trial court's dismissal of the remaining gender discrimination claim on the basis that Mick presented evidence from which a reasonable factfinder could conclude that the Lake Orion Community Schools chose a woman who was less qualified than Mick for the Orion Oaks principal position. In the view of the Court of Appeals majority, Mick presented evidence that, between 1991 and 1999, the overwhelming number of elementary administrator positions went to women within the Lake Orion Community Schools. The Court of Appeals did not discuss the absence of evidence showing that the percentage of women elementary school teachers differed from the percentage of women comprising the qualified applicants. Mick also demonstrated that the Orion Oaks' principal position was not open to the competitive process.[8] The Court of Appeals majority found that the trial court erred in dismissing Mick's gender discrimination claim against Lake Orion Community Schools relative to the Orion Oaks principal position. The Court did not reverse as to the 1999 Stadium

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[7]More specifically, the Court of Appeals found that Mick fulfilled only two of the three prongs of the continuing violations theory (*Meek v Michigan Bell Telephone Co*, 193 Mich App 340, 343-344; 483 NW2d 407 [1991] and *Sumner v Goodyear Tire & Rubber*, 427 Mich 505, 528; 398 NW2d 368 [1991]) but did not satisfy the last prong of the test. Clearly, Mick had noticed that he was being discriminated against on July 1, 1998, the date he filed a gender discrimination charge with the EEOC. However, Mick delayed filing his complaint for more than two years. Under those circumstances, the Court of Appeals ruled that the continuing violations theory did not apply.

[8]Mick has asserted that the failure to follow a competitive process violated the collective bargaining agreement and could be used to draw an inference of discrimination.

Drive Elementary principal job, which was filled by a male, or the 2000 Pine Tree Elementary position, which was filled by a competitive committee process resulting in the selection of a woman with a masters degree in special education and who served on the Wayne State University Board of Governors.

Next, the Court of Appeals majority affirmed the trial court's summary dismissal of Mick's gender discrimination claim under a disparate impact theory. Neither the language of the collective bargaining agreement nor the record submitted below supported Mick's argument on the disparate impact theory.

The Court of Appeals majority also assessed the propriety of the trial court's dismissal of Mick's retaliation claim under MCR 2.116(C)(10). The majority disagreed with defendants' contention that Mick could not establish the requisite showing of retaliation:

> We conclude that Rossi's letter threatening plaintiff with disciplinary measures was circumstantial evidence of retaliation. Plaintiff had never before been disciplined in his twenty-five years of teaching, plaintiff presented evidence from which a reasonable factfinder could conclude that Rossi's letter was not founded in fact, and Rossi's reprimand letter was dated just days after the EEOC issued its February 5, 1999 determination finding merit in plaintiff's allegation that gender discrimination had played a role in the selection of the women chosen for the principal position at Orion Oaks in July, 1998....

In reaching that result, the majority of the Court of Appeals rejected defendants' contention that the alleged retaliatory acts were too remote in time from the filing of Mick's claim with the EEOC in July, 1998, to make the requisite showing of causation. The Court of Appeals majority also criticized the dissent's rejection of plaintiff's retaliation claim against Rossi on the basis that an employer's act which does not permanently affect an employee's economic or employment status does not constitute an adverse act for purposes of establishing retaliation under the Civil Rights Act. The majority expressed its unawareness of any such permanency requirement. It took the position that an adverse employment action need only be materially adverse. Stated otherwise, the majority believed that a reasonable factfinder could conclude that it was more than

mere inconvenience or an alteration of job responsibility for Mick's performance to be criticized for the first time in his twenty-three years of employment with the school district when Rossi referred to Mick as "deceptive and insubordinate" and threatened more severe action.

Writing in dissent, Judge Bill Schuette called for an affirmance of the trial court's dismissal of Mick's claims for retaliation and for employment discrimination. As for Mick's retaliation theory, Judge Schuette opined that Mick failed to establish the requisite element of causation:

> After a review of the record, I conclude that plaintiff failed to establish the fourth element, causation, because the alleged acts were too remote from the filing of the EEOC claim. See *Cox v Electronic Data Systems Corp*, 751 F Supp 680, 695 (ED Mich, 1990) (the plaintiff failed to establish causation regarding her retaliatory discharge claim and she was discharged two months after she filed the discrimination complaint). Here, plaintiff filed the EEOC claim in July, 1998, plaintiff did not apply for another position as principal in defendant's school district until 1999, after at least six months had passed. Similarly, plaintiff was not removed as chairman of the district-level social studies curriculum committee until October, 2000, approximately two years after he filed the EEOC claim. Even if I were to conclude that the loss of the chairman position of the school improvement committee constituted an adverse act, an interim period of at least one year passed between the time he filed the EEOC claim and the time that he resigned in 1999 ....

The dissent offered an additional reason for its conclusion. It found that the complained of acts did not constitute adverse acts for the purpose of a retaliation claim because they did not permanently affect Mick's economic or employment status.

The dissent also disagreed that defendants discriminated against Mick on the basis of his gender. The crux of Mick's claim for discrimination was an assertion that defendants were obligated to abide by the terms of the collective bargaining agreement and that, because defendants took complete subjective control over the hiring process involving violation of the union contract, males, and, particularly Mick, were excluded from the elementary school principal positions. Judge Schuette said that defendants presented testimony of one of the union negotiators that the collective bargaining agreement did not apply to administrators. Further,

Mick had provided the trial court with only two pages of union contract. As substantiation for its conclusion, the dissent also noted that, during the relevant time, twelve females had been appointed to principal positions and that at least nine males had been appointed to twelve principal positions in elementary and middle schools. For the reasons discussed, the dissent called for a ruling affirming the trial court's conclusion that Mick failed to establish that defendants acted with discriminatory animus towards Mick on the basis of his gender.

Defendants now seek leave to appeal or peremptory reversal of the Court of Appeals unfavorable rulings reversing the trial court's summary disposition order.

ARGUMENT I

MICK'S CLAIM FOR REVERSE GENDER DISCRIMINATION FOR THE DENIAL OF POSITIONS AFTER NOVEMBER 21, 1997 WAS PROPERLY DISMISSED PURSUANT TO MCR 2.116(C)(10).

A. STANDARD OF REVIEW.

An appellate court reviews de novo a trial court's decision regarding a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Harts v Farmers Ins Exchange*, 461 Mich 1, 51; 597 NW2d 47 (1999); and *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). In *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999), the Court articulated the standard of review for summary disposition motions brought under MCR 2.116(C)(10). The *Maiden* court explained that a motion under MCR 2.116(C)(10) tests the factual sufficiency of a complaint. In evaluating a motion for summary disposition brought under that subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law.

Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, that party may not rely on mere allegations or denials in the pleadings but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J. Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Smith v Globe Life Ins Co, supra* at 454-455, quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996). "A litigant's mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10)." *Maiden*

v Rozwood, supra at 121. Instead, a litigant opposing a properly supported motion for summary disposition under MCR 2.116(C)(10) must present substantively admissible evidence which creates a genuine issue of material fact to the trial court prior to its decision on the motion. *Id.*

B. MICK FAILED TO RAISE A GENUINE ISSUE OF MATERIAL FACT WITH RESPECT TO HIS REVERSE GENDER DISCRIMINATION CLAIMS.

A claim of reverse discrimination is a claim of intentional discrimination and must be proved by the same standards as any other discrimination claim. *Lind v City of Battle Creek*, 470 Mich 230; 681 NW2d 334 (2004) (applying different standards to determine whether different racial groups have been discriminated against violates the Michigan Civil Rights Act). Intentional discrimination may be proved by direct or indirect evidence. *DeBrow v Century 21 Great Lakes, Inc*, 463 Mich 534, 537-538; 620 NW2d 836 (2001).

In some discrimination cases, there is direct evidence of racial bias. When the plaintiff has direct evidence of unlawful discrimination, then the court should consider the summary disposition record to determine whether the direct evidence of discrimination is sufficient to create a fact question for the jury. *DeBrow v Century 21 Great Lakes, Inc*, 463 Mich 534; 620 NW2d 836 (2001). In that instance, the court does not employ the *McDonnell-Douglas* burden-shifting approach.

Neither the trial court nor the Court of Appeals identified any direct evidence of unlawful discrimination. In its brief to the Court of Appeals, Mick pointed to the Lake Orion Community Schools' purported "pattern and history" of excluding males from administrative posts in elementary schools but presented no evidence regarding the pool. Mick pointed to a claimed disparity in the number of males hired for positions at the elementary school level, but conceded that he had not offered mathematical or statistical proof. (Plaintiff-Appellant's Appeal Brief, pp 38-47). Thus, Mick failed to prove discrimination by pointing to the number of men and women hired in the past.

Mick failed to offer other evidence that directly showed discrimination. No discriminatory remarks or statements can be found in the trial court record. Mick conceded that no one ever told him that he was not hired because he was a male. (Mick Dep, p 48, Defendant's Motion for Summary Disposition). At best, Mick can point to a statement by Lehman, who was asked about the plan she followed to help ensure that both male and female role models were represented in the school administration at all levels. She testified as follows:

> Q And your statement to me a moment ago was that you try to get equal numbers meaning of male and females throughout the district so there is equal representation of male and female? Did I adequately paraphrase what you have testified to?
>
> A Yes.
>
> Q And I would like to know what method you employ as a person in charge of the hiring process to attempt to get equal numbers of men and women in the school district?
>
> A You hire the best qualified person in the—for the job.
>
> Q Okay. And how does that help you attempt to get equal numbers of males and females throughout the district in principal jobs?
>
> A I said you try and get good role models. And if it equals out that is the case that is a positive for you. There is no plan. There is no scheme. There is nothing developed to do that.

(Lehman Dep, Exhibit M, pp 78-79). Lehman pointed out that the Lake Orion Community Schools received more applications for elementary principal positions from qualified female candidates than from qualified male candidates.[9] (Lehman Dep, p 78).[10] Given the make-up of the pool, it is not surprising and no evidence of discrimination that more females have been hired than males at the elementary level. There are more qualified female applicants. This testimony

[9]The Affidavit of Joanne Welihan of the Michigan Elementary and Middle School Principal Association demonstrates that Lake Orion Community Schools' experience is consistent with trends statewide. (Exhibit J).

[10]If one were seeking to ensure that equivalent numbers of males and females were hired at the elementary level, such action would operate to benefit males, not females.

did not , therefore, give rise to an inference of discrimination. It is not enough to create a jury-submissible discrimination claims as the circuit court correctly ruled.

This Court has also embraced the *McDonnell-Douglas* burden-shifting approach to evaluate indirect evidence of discrimination. *Towne v Michigan Bell Telephone Co*, 455 Mich 688; 568 NW2d 64 (1997). This test stems from the United States Supreme Court's framework established in *McDonnell-Douglas Corp v Green*, 411 US 792; 36 L Ed 2d 668; 93 S Ct 1817 (1973). The framework has long been used by the courts of this State. In applying the *McDonnell-Douglas* framework, a court recognizes that varying facts in discrimination cases require courts to tailor the *McDonnell-Douglas* framework to fit the particular situation at hand. In age or sex discrimination action, employee must show that he or she was: (1) member of protected class, (2) subject to adverse employment action, (3) qualified for position, and that (4) others, similarly situated and outside the protected class, were unaffected by employer's adverse conduct. MCL 37.2202(1)(a); *Towne, supra.*

The purpose of the prima facie test is to 1) remove the most common nondiscriminatory reasons for the employer's action, *Texas Dep't of Community Affairs v Burdine*, 450 US 248, 253; 101 S Ct 1089, 1093-1094; 67 L Ed2d 207 (1981) such as poor employee performance, and 2) to force the employer to articulate a nondiscriminatory reason for the discharge. *St. Mary's Honor Center v Hicks*, 509 US 502, 510-511; 113 S Ct 2742; 129 L Ed 2d 848 (1994). Once the employer produces evidence of a nondiscriminatory reason for the discharge, even if that reason later turns out to be incredible, the presumption of discrimination evaporates. *Burdine*, n 7, *supra* at 255; 101 S Ct at 1094-1095.

After the employer has met its burden of production, the employee must proceed without the benefit of the earlier presumptions. However, elimination of the presumption does "not

imply that the trier of fact no longer may consider evidence previously introduced by the plaintiff to establish a prima facie case." *Id.* As the United States Supreme Court explained:

> A satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence. Nonetheless, this evidence and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual. Indeed, there may be some cases where the plaintiff's initial evidence, combined with the effective cross-examination of the defendant, will suffice to discredit the defendant's explanation.

Id. at 255, n 10; 101 S Ct at 1095, n 10. Therefore, "the evidence and inferences that properly can be drawn from the evidence presented during the plaintiff's prima facie case may be considered in determining whether the defendant's explanation is pretextual." 1 Lindemann & Grossman, Employment Discrimination Law (3d ed), p 23.

Once the presumption drops out of the case, the plaintiff retains the ultimate burden of proving discrimination. Plaintiff has the opportunity to come forward with evidence, including the previously produced evidence establishing the prima facie case, sufficient to permit a reasonable factfinder to conclude that the discrimination was defendant's true motive in making the adverse employment decision. *Id.*; *McDonnell-Douglas, supra* at 804; 93 S Ct at 1825; *Combs v Plantation Patterns*, 106 F3d 1519, 1528 (CA 11, 1997).

To prevail, the employee must submit admissible evidence to prove that the employer's nondiscriminatory reason was not the true reason for the discharge and that the plaintiff's age was a motivating factor in the employer's decision. *St. Mary's Honor Center v Hicks, supra* at 507-508; 113 S Ct at 2747-2748. Thus, the employee must prove that the employer's explanation was a pretext for discrimination. The proofs offered in support of the prima facie case may be sufficient to create a triable issue of fact that the employer's stated reason is a pretext, as long as the evidence would enable a reasonable factfinder to infer that the employer's decision had a discriminatory basis. *Udo v Tomes*, 54 F3d 9, 13 (CA 1, 1995). "The strength of

the prima facie case and the significance of the disbelieved pretext will vary from case to case depending on the circumstances. In short, everything depends on the individual facts." *Woods v Friction Materials, Inc*, 30 F3d 255, 260, n 3 (CA 1, 1994).

The Court of Appeals erred in concluding that Mick satisfied this burden. He failed to present a jury-submissible case of discrimination on the basis of indirect evidence. Mick failed to present evidence demonstrating that the articulated reasons for not promoting him were pretextual. Thus, a reversal is required.

The Court of Appeals majority permitted Mick to proceed with his reverse discrimination claim based upon the facts and circumstances concerning Mick's denial for the Orion Oaks administrator position in July, 1998. But the Court totally missed the critical point serving as the linchpin for the decision by the Lake Orion Community Schools.

Orion Oaks Elementary School opened in the fall of 1996. It was a "magnet school" applying a multi-age education concept. Various school district meetings leading to the formation of Orion Oaks Elementary in the fall of 1996 took place. Mick did not attend any of those meetings. He did not apply to teach at Orion Oaks when the school opened in the fall of 1996. Mick applied for the position of assistant at Orion Oaks, he was not selected because he had not previously demonstrated any interest in the Orion Oaks magnet school program or its unique curriculum and approach.

Melanie Olds O'Neil was the successful candidate for the Orion Oaks administrative assistant position. O'Neil had participated in the meetings leading to the formation of the Orion Oaks School. She had applied for and been hired to teach at Orion Oaks when the school opened. She emerged as a leader on the staff during the 1996-1997 school year.

The principal position at Orion Oaks was left vacant in the summer of 1998. O'Neil was appointed to fill the position. She had served the Orion Oaks School as its assistant principal

positive than she appeared." (Exhibit 20). Mick asserted that Lehman was inconsistent because she was not more tolerant of Mick's nervousness in interviews. But these interview notes were from a 1999 interview for the Scripps Middle School principal position,[11] and Rossi did not get the job. In fact, the successful candidate for the position was a male, Kenneth Gutman.

Mick also asserted that Bass complained that Mick used his letter of recommendation (intended for external use only) internally, and, at the same time, allowed both Gloria Rossi and Diane Dunaskiss to have him as a reference. Bass felt that Mick misused his letter because Bass was still working in the system. But both Rossi and Dunaskiss used Bass as a reference after he retired.

Mick argued that Bass, who retired in June of 1998, was predisposed to hiring female administrators. When Bass started as Superintendent of the Western School District in 1981, there were eight male administrators and no female administrators. When he left in 1990 to move to Lake Orion, there were six male administrators and two female principals. Two of the three elementary principals were female in 1990. This cannot be used to give rise to an inference of discrimination. The numbers Mick provided did not reveal the number of applicants, their qualifications, or anything at all that would allow a conclusion regarding Bass's conduct. Nor did Mick's hearsay testimony (and that of Jan Glebe) to the effect that Bass had a reputation for preferring female administrators in the buildings show discrimination. Perhaps farthest from the mark was Mick's contention that Bass must have preferred female principals, because he applied for a position with Playboy after he retired. This statement had no connection in law or logic to any fact material to Mick's claims in this lawsuit. See generally, R Aldisert, Logic for Lawyers (1992), 9-1 to 9-6.

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[11]Exhibit N is the index for documents produced by defendants in this case. Plaintiff's Exhibit 20 is Bates stamped 23420. Exhibit N demonstrates that this document was part of the interview materials for the Scripps Middle School hiring process in 1999.

during the 1997-1998 school year. When she started as principal, O'Neil held a master's degree from Michigan State University. In concluding that a fact issue exists, the Court of Appeals engaged in a mere comparison of the credentials between Mick and O'Neil. It overlooked the critical factor upon which the decision was made to appoint O'Neil to the position. She had a documented history of interest in and involvement with the Orion Oaks magnet school.

In essence, the Court of Appeals has found a jury-submissible case because the school district decided to hire someone with a history of involvement in a school over someone else whose paper credentials arguably looked better. But the courts are not to second-guess such judgment calls under the guise of enforcing anti-discrimination laws. If the employer determines that hand-on experience coupled with a history of enthusiasm for a new approach is more important than credentials that are arguably better but roughly similar, it is not for court to disagree. The Court's decision wrongly suggests that an employer may never deviate from an applicant's resume in filling vacant positions. Non-resume qualifications are crucial. Mick presented no basis for concluding that the school district's desire for a commitment to the magnet school concept and its judgment that a former teacher at the school who was familiar with its operations and had served as an assistant principal would better serve the school than Mick. The Elliott-Larsen Civil Rights Act does not make courts (or juries) the employer of last resort. It does not allow them to second-guess good faith judgments regarding the necessary and desirable qualifications for a position. To the contrary, the burden-shifting paradigm is intended to weed out such claims leaving only those on which there is a genuine issue of material fact. That is not the case here.

Nor does Mick's other testimony help create a fact question. Mick misused Lehman's notes regarding Gloria Rossi being nervous during an interview. Lehman's notes on an interview with Gloria Rossi stated, "Gloria must have been nervous" and "Gloria is much more

As with Bass, Mick made several efforts to attack Gloria Rossi. The relevance of those purported facts to Mick's discrimination claim was unclear. Mick pointed to Rossi's email stating "I am exercising my right to be a woman and change my mind." In the second email, Rossi stated, when her secretary was changing buildings, "I feel like the woman who's been left for a younger model." Neither statement evidenced an intent to discriminate against men on the basis of gender.

Mick also suggested that Rossi sought to get rid of other male staff members, namely, Mike Kulik and Howard Sanford. Director of Special Education, Tom Harwood, was involved in the decision-making regarding Kulik, a special education teacher. And Director of Buildings and Grounds, Lloyd English, was part of the decision-making regarding Howard Sanford, a custodian. Both Kulik and Sanford resigned. Sanford did so after he was directed to identify the source of a leak of confidential information and after a full opportunity to discuss his options with his union. Just prior to the meeting at which Sanford resigned, Rossi had received complaints that Sanford was sexually harassing and threatening co-workers and that he had threatened to turn down the school. The purpose of the meeting had been to discuss these complaints. Sanford resigned before the complaints were addressed. (See January 2, 2001 letter of Dr. Younkman, Exhibit O). This does not give rise to an inference of discrimination.

Mick failed to raise a jury-submissible case under either the direct or indirect evidence method. Mick was not hired because he was not the best person for the job. His claim was properly dismissed. This Court should therefore reverse the Court of Appeals and grant summary disposition in favor or the Lake Orion Community Schools.

ARGUMENT II

MICK'S CLAIM FOR RETALIATION WAS PROPERLY DISMISSED PURSUANT TO MCR 2.116(C)(10).

A. STANDARD OF REVIEW.

The standard of review for this argument is the same as for Argument I.

B. MICK FAILED TO RAISE A GENUINE ISSUE OF MATERIAL FACT REGARDING HIS RETALIATION CLAIM.

The Elliott-Larsen Civil Rights Act prohibits an employer from retaliating against an employee who has either opposed a violation of the statute or who has asserted rights under it. MCL 37.2701(a). A prima facie case for a retaliation is made by showing that: (1) the plaintiff engaged in protected activity; (2) this was known by the defendant; (3) the defendant took an adverse employment action against the plaintiff; and (4) there was a causal connection between the protected activity and the adverse employment action. *Barrett v Kirtland Community College*, 245 Mich App 306, 315-316; 628 NW2d 63 (2001), citing *Meyer v Centerline*, 242 Mich App 560, 568-569; 619 NW2d 182 (2000) and *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997). See MCL 37.2701. Mick failed to establish a fact issue as to at least two of the four prongs of a prima facie case for retaliation.[12] Mick was unable to prove that defendants took an adverse employment action. In addition, Mick failed to show any causal connection between his involvement in a protected activity and any alleged adverse employment action.

MCL 37.2701 does not define either the term "discriminate" or the term "retaliate." In interpreting discrimination, Michigan courts, like federal courts, have required a showing that the complained-of conduct deprived the plaintiff of harm with respect to a term, condition, or

[12]Mistakenly, the Court of Appeals majority said that defendants only challenged the causation element of a prima facie case for retaliation.

privilege of employment. Absent a change in rank, pay, or benefits, courts have refused to find the conduct actionable.

Just as Michigan courts borrow from federal law to define the proofs necessary to demonstrate a discrimination claim so too is it appropriate to look to federal law for assistance in defining what constitutes a materially adverse employment action. See *Radtke v Everett*, 442 Mich 368, 381-382; 501 NW2d 155 (1993) quoting *Sumner v Goodyear Tire & Rubber Co*, 447 Mich 505, 525; 398 NW2d 368 (1986). Federal courts have rejected retaliation claims based on minor incidents such as that at issue here.

The Fifth Circuit, for example, found that a verbal threat of being fired, a reprimand for not being at an assigned station, a missed pay increase, and being placed on "final warning" status, did not amount to materially adverse employment actions because they did not constitute an ultimate employment action. *Mattern v Eastman Kodak Co*, 104 F3d 702, 708 (CA 5, 1997). See also *Foley v University of Houston System*, 324 F3d 310 (CA 5, 2003). Other circuits have applied slightly less stringent standards but still have rejected minor inconveniences and actions that do not alter rank, pay, or benefits. See e.g., *Bass v Board of County Comm'rs*, 256 F3d 1095, 1117 (CA 11, 2001); *Munday v Waste Management of North America, Inc*, 126 F3d 239, 242 (CA 4,1997); *Smith v First National Bank*, 202 F3d 234, 248, n 11 (CA 4, 2000).

These limitations are important because, without them, almost any workplace conduct can be labeled as retaliatory. Inter-office disputes wholly unconnected to the employee's protected conduct can otherwise be a source of potential liability for employers. See generally, Stepahnie Armour & Barbara Hansen, *Flood of "Retaliation" Cases Surfacing in US Workplace*, USA Today, Feb 10, 1999, at 1A (employers "might fear they can't demote a bad performer if that worker has ever complained about harassment or discrimination. If they do, they fear a lawsuit"). The Legislature did not enact a statute that provided a safe harbor from future

workplace discipline for employees. Otherwise, employees may, and some undoubtedly will, strategically lodge complaints in order to protect themselves from efforts to ensure that they are doing their jobs.

An adverse employment action occurs when an employee suffers some personal loss or harm with respect to a term, condition, or privilege of employment. *Hoffman v Rubin*, 193 F3d 959 (CA 8, 1999). When there is no change in rank, pay, or other benefits, an adverse employment action has not occurred. *Id.* Likewise, it has been said that an employment action must be final or lasting in order for it to constitute an adverse employment action. *Dobbs-Weinstein v Vanderbilt University*, 185 F3d 542 (CA 6, 1999).

Michigan courts have required an adverse employment action to be materially adverse. *Meyer v Centerline, supra*. It must be more than mere inconvenience or an alteration of job responsibilities. *Id.* A plaintiff must have an objective basis rather than mere subjective impressions for demonstrating that the change is adverse. *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347; 597 NW2d 250 (1999). As the *Meyer* court explained, not every unpleasant matter short of discharge or demotion creates a cause of action for retaliatory discharge. For example, being shunned by one's co-workers or being treated with hostility is not an adverse employment action when one suffers no accompanying loss in title, salary, or benefits. *Meyer, supra*. Other than advancing her own subjective views on the subject, the *Wilcoxon* plaintiff failed to make any showing that her transfer to a new position was an adverse employment action. Although she ceased her involvement in governmental affairs affecting outdoor advertising, the plaintiff assumed responsibility for the company's public service activity nationwide. Under the circumstances, the court could hardly impute an adverse employment action to the defendant. Further, since the defendant had not stripped her of any of the

accouterments of her former position, the plaintiff was unable to meet her burden of presenting evidence to show that the transfer was materially adverse.

The Seventh Circuit, in *Williams v Bristol-Myers Squibb Co*, 85 F3d 270 (CA 7, 1996), cautioned that, if the proper threshold is abandoned, every trivial personnel action that an irritable, chip-on-the-shoulder employee does not like can form the basis of a discrimination suit. This concern is not merely theoretical but can be seen in many of the suits filed. Absent this limitation, courts will be flooded with lawsuits claiming retaliation for the assignments given to an employee, to changes in his or her office space, and for decisions made in a host of other areas of the work setting.

The evidence fails to establish that Mick was subjected to an adverse employment action during the relevant time of his employment at Lake Orion Community Schools. Defendants' behavior did not affect any diminution in Mick's title, salary, or benefits. There were no changes in Mick's duties or working conditions. Mick's complaints about incorrect paychecks that were later corrected and written disciplinary warnings that were later removed from his personnel file did not as a matter of law constitute an adverse employment action sufficient to support a claim for retaliation. In addition, Rossi's February 11, 1999 memo concerning Mick's performance was not accompanied by any diminution in title, salary, or benefits. That brings Mick's case squarely within the holding of *Meyer v Centerline*, where the court explicitly stated that being shunned by one's co-workers or being treated with hostility is not an adverse employment action.

One shudders to think of the ramifications of accepting a ruling that an employer's criticism of an employee are sufficient to constitute adverse employment action so as to give rise to an actual claim for retaliation. An employer must be at liberty to document an employee's shortcomings. See *Silk v City of Chicago*, 199 US App LEXIS 25208, at *28 (CA 7, 10/8/99) (no adverse employment action found in ADA case on basis of lowered performance ratings);

Primes v Reno, 199 US App LEXIS 21936, at *7-8 (CA 6, 9/13/99) ("If every low evaluation or other action by an employer that makes an employee unhappy or resentful were considered an adverse action, Title VII would be triggered by supervisor criticism or even facial expressions indicating displeasure"); *Ellis v Director, CIA*, 1999 US App LEXIS 21638 (CA 4, 9/10/99) (lowered performance ratings and exclusion from job deployments, language training, and a conference, are not actionable); *Montandon v Farmland Industries*, 116 F3d 355, 359 (CA 8, 1997) (lower evaluation score did not rise to level of adverse employment action where no demonstrable result flowed from lower score); *Smart v Ball State University*, 89 F3d 437, 442 (CA 7, 1996) (unfavorable employment evaluation is not the type of adverse employment action that can trigger a retaliation claim unless it is accompanied by some other action such as probation). To suggest that steps taken by an employer to criticize and to document an employee's conduct amounts to actionable retaliation is to effectively remove from employers the right to monitor an employee's work conduct for fear that the employee will then turn around and bring a claim for retaliation under Michigan's Elliott-Larsen Civil Rights Act. Michigan law neither requires nor permits such a result.

Mick failed to make out a prima facie case of retaliation. And the trial court did not err in granting defendants' summary disposition motion. Mick also fell short in his attempts to prove the requisite causal relationship between his filing of an EEOC complaint and the conduct complained of by him. To establish the causation element of a prima facie case for retaliation, a plaintiff must show not just a causal link between participation in activity protected by the Civil Rights Act and the employer's alleged adverse employment action but also that it was a "significant factor." *Jacklyn v Schering-Plough Health Care Products Sales Corp*, 176 F3d 921, 929 (CA 6, 1999) and *Polk v Yellow Freight System, Inc*, 801 F2d 190, 199 (CA 6, 1986). Mick

cited no evidence whatsoever to suggest that his filing of an EEOC complaint was a "significant factor" in Rossi's February 11, 1999 memo threatening Mick with disciplinary action.

It is said that the significant factor standard requires a showing of more than a causal link. *Cox v Electronic Data Systems Corp*, 751 F Supp 680 (ED Mich, 1990). That is because a factor can be a cause without being significant. However, only a significant factor suffices to show retaliatory conduct. All that Mick alleged was that his discharge occurred after he filed an EEOC complaint and that his supervisors knew about the complaint. Such allegations are insufficient, in and of themselves, to state a prima facie case for retaliation.

In addition, the lapse of time between Mick's filing of an EEOC complaint and the conduct he complains of weighs against any finding of retaliation. The undisputed evidence shows that, well before the filing of Mick's EEOC complaint, Mick unsuccessfully applied for a number of positions. There were numerous reasons why Mick did not get the job. Mick lacked credentials and qualifications for positions he sought. Mick lacked administrative experience. Mike was too nervous during interviews. Mick's failure to express an interest in the development of the "magnet school" led to his denial for other positions. Mick filed an EEOC complaint regarding his failure to obtain a promotion. But his having done so was not a significant factor in any decision not to appoint him to a principal position. Nor did it affect the criticism of him. Rossi did not send her memo to Mick until some seven months after Mick filed his EEOC complaint in July of 1998.

Summary disposition for a defendant is appropriate when a plaintiff cannot factually demonstrate a causal link between a protected activity and an adverse employment action. *West v General Motors Corp*, 469 Mich 177, 184; 665 NW2d 468 (2003). In order to prevail, a plaintiff must show that his employer took the adverse employment action "because of" the plaintiff's protected activity and that the adverse employment action was "in some manner

influenced by the protected activity ...." Something more than a temporal connection between a protected activity and an adverse employment action is required to show causation where discrimination based upon retaliation is claimed. *Id.* at 185. The *West* court analyzed the proofs necessary to establish a causal connection between protected activity and an adverse employment action. It concluded that a plaintiff must show something more than merely a coincidence in time between the protected activity and the adverse employment action.

The alleged retaliatory acts here were remote in time from the filing of plaintiff's EEOC complaint in July, 1998. Thus, they do not support a viable claim for retaliation. Rossi's memo to plaintiff was not sent until seven months later, on February 11, 1999. Further, once having filed the EEOC complaint in July, 1998, Mick did not apply for another principal position until 1999, at least six months later. Mick was not removed as chairman of the district level social studies curriculum committee until October of 2000. This timeline underscores Mick's failure to meet his burden of proving the requisite causal connection sufficient to withstand defendants' motion for summary disposition.

To prove his case for retaliation, Mick pointed to the fact that he was disciplined for the first time in his career. But simply because one event follows another does not mean that the first caused the second.[13] Mick presents no basis for concluding that any of these events was in any way connected with his filing an EEOC charge. He simply announces that his having been "disciplined" amounted to an adverse employment action and then reasons that since these "items never occurred" before, they must be enough to "imply a causal relation between events."

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[13]This represents the well-known logical fallacy of *post hoc ergo propter hoc* ("afterwards, therefore because"). This fallacy arises where one event is taken to be the cause of another "merely because the former temporally precedes the latter." Douglas Lind, Logic and Legal Reasoning (2001), p 272.

(Plaintiff/Appellant's Appeal Brief, p 37). They do not and the trial court correctly rejected this speculative claim. The Court of Appeals erred in reversing the grant of summary disposition.

CONCLUSION

The Court of Appeals majority should have called for an affirmance of the trial court's summary disposition ruling. Following upon the application of the traditional *McDonnell-Douglas* analysis, the Court of Appeals was bound to conclude that Mick lacked a viable claim for reverse discrimination. Mick did not and could not prove that his qualifications for the principal position equaled or exceeded those of the eventual appointee. Likewise, the Court of Appeals majority erred in finding that Mick produced sufficient evidence to raise a genuine issue of material fact concerning the required elements of a prima facie claim for retaliation, i.e., the involvement of an adverse employment action and the requisite causal connection. As a matter of law, Mick was unable to demonstrate the existence of a genuine issue of material fact sufficient to withstand defendants' summary disposition motion as to either Mick's claim for a reverse discrimination or for a retaliation. Thus, peremptory reversal or a grant of leave is required.

RELIEF

WHEREFORE, defendants-appellees, Lake Orion Community Schools, Robert Bass, Richard Kast, Craig A. Younkman, Gloria Rossi, Christine Lehman, and David Beiter, respectfully request that the Court peremptorily affirm the Court of Appeals June 3, 2004 opinion affirming the trial court's summary disposition order, peremptorily reverse those portions of the opinion reversing the trial court's summary disposition order, and, failing that, grant this application for leave to appeal.

Respectfully submitted,

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DATED: April 28, 2005

STATE OF MICHIGAN

IN THE SUPREME COURT

DAVID M. MICK,

Plaintiff-Appellee,

-vs-

LAKE ORION COMMUNITY SCHOOLS, ROBERT BASS, RICHARD KAST, CRAIG A. YOUNKMAN, GLORIA ROSSI, CHRISTINE LEHMAN, DAVID BEITER,

Defendants-Appellants,

-and-

DAVID M. MICK,

Plaintiff-Appellee

-vs-

ROBERT BASS, an individual and RICHARD KAST, an individual,

Defendants-Appellants,

_____/

Supreme Court No. 126547

Court of Appeals No. 241121

Oakland County Circuit Court No. 00-027577-NZ

Supreme Court No. 126548

Court of Appeals No. 241122

Oakland County Circuit Court No. 01-033085-NZ

PROOF OF SERVICE

CHRISTINE M. WARNEZ, says that on April 28, 2005, a copy of the Supplemental Brief in Support of Peremptory Reversal or Leave to Appeal, was served on JEFFREY S. BURG, Attorney for Appellee, 2301 West Big Beaver Road, Suite 525, Troy, MI 48084-3328, by depositing same in the United States Mail with postage fully prepaid.

Christine M. Warnez

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